

# A Look At Health Care Providers' Workplace Safety Duties

By **Victor Moldovan and Dan Silverboard** (June 6, 2023)

Hospitals and other health care providers always have had a duty of some kind to provide a safe environment for employees, patients and other visitors. The source of that duty can be found in various federal and state laws and regulations, workers compensation programs and common law developed in appellate opinions.

The primary focus of those laws is the safety of the physical plant including fire hazards, infection control, access to private areas and records, access to stairwells, rooms sizes and corridor widths and other similar items.

The duty to provide a safe environment now includes addressing workplace violence, which includes physical assault and the use of guns and other means of force.

The issues are what is the duty of health care providers to prevent violence, and how should they meet that duty while at the same time continuing to provide health care service in a supportive manner.

The discussion of those issues raises additional considerations as to whether the duty of health care providers is different from those at other public locations like shopping centers, schools or grocery stores.

At the federal level, the Occupational Safety And Health Act requires employers to furnish "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees."

Notably, the Occupational Safety and Health Administration has interpreted this requirement, known as the general duty clause, to require hospitals to protect their workers from incidents of violence.

In particular, on May 9, OSHA fined Texas Children's Hospital for failing to implement measures to control assaults against health care workers by what it termed "aggressive behavioral health patients."

OSHA specifically found that though had been 15 recordable incidents of workplace violence in 2022, the hospital, in violation of the OSH Act, failed to take measures to abate the threat of violence against its workers.

The prevention of workplace violence in hospitals has been a topic of concern for OSHA for some time. In 1996, OSHA first published its "Guidelines for Preventing Workplace Violence of Healthcare and Social Services Workers."

The document, which was updated in 2004 and 2016, sets forth voluntary guidelines for violence prevention programs to be implemented by inpatient facilities.

On June 25, 2015, OSHA issued a document titled "Inspection Guidance for Inpatient Healthcare Settings," in which workplace violence in hospitals and residential care facilities



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was specifically called out as a focus hazard.

Prior to the Texas Children's Hospital case, in 2017 OSHA fined Brooke Glen Behavioral Health Hospital in Fort Washington, Pennsylvania, \$32,000 for failing to protect its workers against workplace violence.

In April, an administrative law judge upheld OSHA's enforcement action against Fuller Hospital in Attleboro, Massachusetts, where it was found the hospital failed to implement safeguards to protect its employees against workplace violence. In that case, over 500 incidents of aggression occurred within a 7-month period.

The OSHA guidelines set forth a number of recommended measures hospitals and other inpatient facilities should take to address workplace violence. These include, most predominantly, the implementation of a written violence prevention program to address known hazards or threats of workplace violence.

The violence prevention program should include, among other things, a system for assessing patient aggressiveness as part of the intake procedure, engineering and design controls to contain aggressive patients, administrative protocols for reporting aggressive behavior and post-incident investigation procedures.

In the case of Texas Children's Hospital, OSHA found that the hospital had failed to implement such a program and, further, had failed to train its at-risk employees to address threats of violence.

At the state level, several states have enacted legislation designed toward reducing acts of violence.

California has, unlike OSHA, adopted a specific Workplace Violence Prevention in Health Care standard.

More recently, on May 15, Texas enacted S.B. 240. This law requires hospitals, nursing facilities and ambulatory surgical centers, among others, to develop and implement a workplace violence prevention plan and policy that prescribes "a system for responding to and investigating violence incidents and potentially violence incidents at the facility."

On May 2, Georgia adopted the Safer Hospitals Act. This law creates enhanced criminal penalties for persons who assault health care workers on a hospital campus and, further, grants to hospital security staff the same law enforcement powers — including the right to arrest — as local law enforcement.

The law was enacted in response to data documenting a rise in violence against health care workers. For example, data from the U.S. Bureau of Labor Statistics showed that in 2018 health care workers faced 73% of all nonfatal injuries from workplace violence and were five times more likely to experience workplace violence than employees in other industries.

In signing H.B. 383 into law, Georgia joined 40 other states that have enacted legislation establishing increased penalties for assaults on health care workers.

Outside of state and federal laws, Medicare conditions of participation and Joint Commission accreditation requirements, while not creating a legal duty of care per se, do require certain inpatient facilities to implement measures to mitigate the threat of workplace violence.

Notably, the Medicare condition of participation for psychiatric hospitals, which requires patient treatment plans to include an assessment of a patient's proclivity to commit violence toward themselves or others.

Psychiatric hospitals must then, as a condition of participating in Medicare, assess a patient's history of violence and aggressive tendencies, and implement relevant controls.

From an accreditation standpoint, on Jan. 1, 2022, the Joint Commission enacted its workplace violence prevention standards for hospitals. The standards, which apply to all hospitals and critical access hospitals seeking Joint Commission accreditation, require these facilities to conduct a hazard assessment, adopt a workplace violence prevention program, and conduct staff training and education on responding to threats of violence.

At the same time as the federal government and some states are allowing more restrictive measures to ensure the safety of everyone in health care facilities, they are not restricting the carrying of guns into those facilities.

Federal and state law, with a few exceptions, do not prohibit carrying firearms into hospitals or any other health care facility. Allowing those facilities themselves to prohibit the carrying of guns into facilities varies by state.

The result is that health care providers must adopt measures to address the risk of harm to employees, patients and everyone else who is in their facility. The overall pace of mass shootings has not exempted health care facilities.

The guidance does not specify the specific preventative measure to address violence in health care facilities. The guidance does not, for the most part, address noninstitutional settings like doctor's offices and other clinical environments. Yet, the risk of incidents of violence in those settings is just as profound.

A clinic in Atlanta suffered a deadly workplace shooting in May when a patient began shooting at the clinic's employees in the waiting room. In the aftermath of those kinds of events, the question is: What could the employer do to mitigate the risk?

Short of installing metal detectors to prevent guns being carried into the facility, which is not allowed in many states because of the right to carry guns, how could the clinic have stopped the shooting?

Should every health care provider be required to hire armed security guards to meet the duty it has to its patients and employees? Is the adoption of protocols that focus on identifying violent patients or employees and taking steps to bar their presence sufficient?

Having discussed the legal landscape, it is plain that under OSHA and common law an employer in the health care setting must take reasonable actions to protect its workforce.

This is not limited to hospitals and other inpatient facilities. At the minimum, facilities should, in order to comply with OSHA, develop and implement a workplace violence prevention program that tracks the OSHA guidelines as well as pertinent state law requirements.

In addition, noninstitutional facilities such as clinics should use the available guidelines to develop policies and protocols to identify threats to worker safety.

This would include, for example, an assessment of aggressive behavior shown by the patient as part of the initial health assessment, as well as training to staff on incident response. Such actions are necessary to protect other patients as well as to mitigate the employer's own potential legal liability.

Health care providers cannot prevent all acts of violence in their facilities. The risk of liability, outside of possible citations for violations of federal and state law, is and will be determined by traditional tort principles.

Did the facility have prior knowledge of a risk of violence or was it otherwise reasonably foreseeable and did the facility take the appropriate measures to mitigate that risk to the extent mitigation is permitted under the law?

The current escalation of violence in the workplace should be addressed by providers through an evaluation of their policies, protocols and mitigation measures and modifications to those, as necessary.

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